Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-812

HENRY CARL DEAN,

Petitioner,

v.

AMERICAN SECURITY INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

CHARLES E. MOORE
Of Counsel for
Petitioner

325 Hammond Drive
Suite 205
Atlanta, Georgia
30328

BRUCE D. DUNCAN
Counsel for
Petitioner

325 Hammond Drive
Suite 205
Atlanta, Georgia
30328

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. _____

HENRY CARL DEAN,

Petitioner

v.

AMERICAN SECURITY INSURANCE COMPANY,

Respondent

Petition for a Writ of Certiorari to the

United States Court of Appeals for

the Fifth Circuit

Comes now the Petitioner, HENRY CARL DEAN, and prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on September 23, 1977.

OPINIONS BELOW

The opinion of the District Court for the Northern District of Georgia is reported at 429 F.Supp. 3. The opinion of the

Court of Appeals for the Fifth Circuit is reported at 559 F.2d 1036. Both opinions are appended to this Petition in the Appendix at pages 8-15 and 16-26, respectively.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was made and entered on September 23, 1977. The Petitioner's Motion for a Rehearing In Banc was denied on October 26, 1977, by the Fifth Circuit Court of Appeals. Copies of the Judgment and the Order denying the Petition for Rehearing In Banc are appended to this Petition in the Appendix at pages 27-28 and 29-30. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

In a suit brought under the Age Discrimination in Employment Act (ADEA) of 1967, the Petitioner sought to recover general damages for pain and suffering as well as punitive damages. The District Court ruled that the Plaintiff could seek general damages for pain and suffering and punitive damages. The Court of Appeals reversed. The questions presented are thus:

1. Whether or not a private ligigant is entitled to recover general damages for pain and suffering in a private action brought under the ADEA of 1967.
2. Whether or not a private litigant is entitled to recover punitive

damages in a private action brought under the ADEA of 1967.

STATUTES INVOLVED

The pertinent portions of 29 U.S.C. §621 et seq. are set forth in the Appendix on pages 31 and 32.

STATEMENT

This litigation arose out of the discharge of the Petitioner from his employment with the Respondent. The basic facts which are not in dispute are as follows: The Petitioner was employed with the Respondent from September 30, 1971, through October 31, 1975, as a Property Damage Claims Manager. At the time of his discharge, Petioner was 53 years of age. Pursuant to 29 U.S.C. §621 et seq., this suit was instituted by the Petitioner on February 6, 1976, in the United States District Court for the Northern District of Georgia, Atlanta Division, alleging that the Petitioner had been discriminated against by the Respondent due to the age of the Petitioner. The Petitioner seeks reinstatement, back pay, liquidated damages, general damages, punitive damages, attorneys fees, and injunctive relief.

On March 17, 1976, the Respondent filed a Motion to Strike the Petioner's demand for general damages and punitive damages. On June 30, 1976, United States District Court Judge Newell Edenfield denied Respondent's Motion to Strike, however, he granted Respondent an interlocutory order to appeal to the United States Court of Appeals

for the Fifth Circuit, the issues of recovery of general and punitive damages in ADEA litigation. On September 23, 1977, the United States Court of Appeals for the Fifth Circuit reversed the District Court's ruling and on November 9, 1977, the said Court of Appeals granted a stay of the issuance of the mandate.

REASONS FOR GRANTING THE WRIT

The decision of the Unites States Court of Appeals for the Fifth Circuit should be reviewed because it erroneously placed too great an emphasis on the so-called "administrative remedies" and did not sufficiently consider the language of the statute creating the ADEA of 1967. More importantly, the decision of the Court of Appeals has decided an important question of Federal law which has not been settled by this Court. In ruling that a private litigant cannot recover general damages for pain and suffering and punitive damages the Court of Appeals ruled contra to the following cases: Murphy v. American Motors Sales Corporation, 410 F. Supp. 1403; Brennan v. Paragon Employment Agency, Inc., 489 F.2d 752; Combes v. Griffin Television Incorporated, 421 F.Supp. 841; Bertrand v. Orkin Exterminating Co., Inc., 419 F.Supp. 1123, 432 F.Supp. 952; Locascio v. Teletype Corp., 74 F.R.D. 108.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BRUCE D. DUNCAN
Counsel for Petitioner
325 Hammond Drive
Suite 205
Atlanta, Georgia 30328

Of Counsel,

CHARLES E. MOORE
325 Hammond Drive
Suite 205
Atlanta, Georgia 30328

PROOF OF SERVICE

I, BRUCE D. DUNCAN, one of the attorneys for HENRY CARL DEAN, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 6th day of December, 1977, I served copies of the foregoing Petition for a Writ of Certiorari as follows:

On AMERICAN SECURITY INSURANCE COMPANY, Respondent, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their attorneys of record, DAVID AUFDENSPRING and CARL CANNON, at POWELL, GOLDSTEIN, FRAZER & MURPHY, 1100 C & S National Bank Building, 35 Broad Street, Atlanta, Georgia 30303

BRUCE D. DUNCAN
Counsel for Petitioner
325 Hammond Drive
Suite 205
Atlanta, Georgia 30328

APPENDIX

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. _____

HENRY CARL DEAN,

Petitioner

v.

AMERICAN SECURITY INSURANCE COMPANY,

Respondent

ON APPEAL FROM

THE FIFTH CIRCUIT COURT OF APPEALS

Henry Carl DEAN

v.

AMERICAN SECURITY INSURANCE COMPANY.

Civ. A. No. C76-237A

United States District Court,
N. D. Georgia,
Atlanta Division.

June 30, 1976

Action was brought under Age Discrimination in Employment Act to recover general and punitive damages and for injunctive relief. The District Court, Edenfield, J., held that remedies available under the Act, including compensatory and punitive damages, are not limited by amounts stipulated in the Fair Labor Standards Act, and that plaintiff's attorney who had been employed by defendant in same department and under same supervisor as plaintiff would be disqualified, but that plaintiff's other attorneys who shared office with disqualified attorney would not be disqualified.

Defendant's motion to strike denied and motion to disqualify plaintiff's attorneys granted in part and denied in part.

Charles E. Moore, Bruce D. Duncan, W. Larue Boyce, Atlanta, for plaintiff.

David R. Aufdenspring and R. Carl Cannon, of Powell, Goldstein, Frazer & Murphy, Atlanta, for defendant.

ORDER

EDENFIELD, District Judge.

Plaintiff has brought this action for age discrimination, pursuant to 29 U.S.C. §§621, et seq., for general and punitive damages and injunctive relief. The case is currently before the court on defendant's motion to strike the claim for general and punitive damages, defendant's motion to disqualify plaintiff's attorneys, and plaintiff's motion to compel discovery.

[1] This district has recently held in three separate actions that compensatory and punitive damages may be awarded under the Age Discrimination in Employment Act inasmuch as the specific language of that Act allows the court to grant "such legal and equitable relief as may be appropriate to effectuate the purposes of this chapter," 29 U.S.C. § 626(b), Murphy v. American Motors Sales Corp., 410 F.Supp. 1403 (N.D.Ga. 1976) (Moye, J.), Wilson v. American Motors Sales Corp., No.C76-125A (N.D.Ga. April 16, 1976) (Hill, J.)

and Davis v. Adams-Cates Co., No. C76-136A (N.D.Ga., June 30, 1976) (Edenfield, C. J.). The defendant nonetheless argues that § 626 (b)[1] makes the Age Act part of the Fair Labor Standards

1. Section 626(b) of Title 29, U.S.C., provides: "The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion."

Act (FLSA), 29 U.S.C. §§ 201, et seq., and incorporates into the Age Act the remedies available under the latter Act. It is true that § 626(b) dictates that the amounts owing to one discriminated against under the Age Act "be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 [FLSA enforcement provisions]." It is also true that "liquidated damages" as defined in the FLSA, 29 U.S.C. § 216, are to be awarded under the Age Act only when there is a willful violation of the Act (as is true under the FLSA, 29 U.S.C. § 260). But it is apparent from a reading of § 626(b) that Congress intended the Age Act remedies to be broader in scope than those under FLSA. The section provides for whatever legal and equitable relief is needed to compensate the victims of age discrimination, in addition to the specific remedies outlined in the FLSA. Congress was no doubt concerned with the myriad ways in which an individual could be harmed by willful discriminatory conduct on the part of an employer. Unlike FLSA, the Age Act is intended to do more than repay employees for unpaid minimum wages; it is "intended to alleviate the serious economic and psychological suffering of people between the ages of 40 and 65 caused by widespread job discrimination against them," Brennan v. Paragon Employment Agency, Inc., 356 F.Supp. 286, 288 (S.D.N.Y. 1973). Thus, since the harm which may result from a violation of the Age Act may be significantly greater than harm caused by violation of FLSA, it is appropriate

that the remedies available under the Age Act-including compensatory and punitive damages-not be limited by the amounts stipulated in the FLSA. The defendant's motion to strike is therefore DENIED. However, because there is substantial ground for difference of opinion on this issue, the court hereby CERTIFIES the issue for interlocutory appeal, 28 U.S.C. § 1292(b).

The defendant seeks to have all three of plaintiff's attorneys disqualified because one of the attorneys, W. LaRue Boyce, was a former employee of defendant. It appears that Mr. Boyce and the plaintiff both worked in the claims department of the defendant corporation and that Mr. Boyce earned his law degree while working there. Although he neither represented defendant in any legal matters nor performed any legal tasks for it, defendant nonetheless argues that Boyce should not be retained by plaintiff because he has had access to certain confidential information which he should not be entitled to use as plaintiff's attorney. The defendant also contends that Mr. Boyce should not be retained because he may be called as a witness by the plaintiff due to his knowledge of hiring practices in the claims department, and that it would be inappropriate for him to act as advocate and witness in the same action. Moreover, since Mr. Boyce has been associated with Messrs. Duncan and Moore in the preparation of this case, defendant believes that they, too, should be dis-

qualified because Mr. Boyce may have imparted some confidential information to them. The plaintiff opposes the motion, asserting inter alia that he has no intention of calling Mr. Boyce as a witness.

[2, 3] The defendant claims, on the one hand, that Mr. Boyce should be disqualified because he had access, as an employee, to certain confidential information and, on the other, that he should be disqualified because he may properly be called to testify about that information. Despite the apparent inconsistency of such an argument, the court agrees that it would be improper for Mr. Boyce to represent the plaintiff. Although Mr. Boyce was not employed as an attorney by the defendant (thus allowing him to testify on matters relating to his employment), the court nonetheless believes that Mr. Boyce has been too closely involved with the parties to the action to be able to "exercise independent professional judgment on behalf of [his] client," Ga. Code Ann., Title 9 Appen., Rule 3-105. Both Mr. Boyce and the plaintiff were employed in the same department, under the same supervisor. That supervisor had discussions with Mr. Boyce concerning alleged employment problems with the plaintiff. There is also evidence from both parties indicating that Mr. Boyce's departure from the claims department was occasioned by disagreement with his supervisors and was somewhat less than amicable. It should be apparent to all

concerned that it is not in the interest of justice to allow attorneys, acting as officers of the court, to become too personally involved in the parties' dispute. For this reason, defendant's motion to disqualify Mr. Boyce is hereby GRANTED. At the same time, the court perceives no reason why Messrs. Duncan and Moore should also be disqualified. The fact that Mr. Boyce may have imparted some information concerning his employment to them is irrelevant; Mr. Boyce may legally impart that information to all who will listen in open court. The fact that the three attorneys share the same office (although they are not partners in one firm) does not, in itself, preclude them from exercising independent professional judgment. The defendant's motion to disqualify Messrs. Duncan and Moore is therefore DENIED.

The plaintiff has moved to compel answers to his first interrogatories. Inasmuch as the plaintiff has failed to comply with Local Rule 91.61, his motion to compel is DEFERRED to allow plaintiff to comply with the rule. Plaintiff is ALLOWED five (5) days to supplement his motion and defendant is ALLOWED five (5) days thereafter to respond. The court cautions the defendant, however, that its response should specifically delineate the reasons it cannot respond to each interrogatory; a repeat of the standard objections made previously will not be sufficient.

In sum, defendant's motion to strike is DENIED, and its motion to disqualify plaintiff's attorneys is GRANTED in part and DENIED in part as outlined above; plaintiff's motion to compel is DEFERRED pending supplemental pleadings.

HENRY CARL DEAN,

Plaintiff-Appellee,

v.

AMERICAN SECURITY INSURANCE COMPANY,

Defendant-Appellant.

No. 76-3272

United States Court of Appeals
Fifth Circuit.

Sept. 23, 1977.

Action was brought under Age Discrimination in Employment Act to recover general and punitive damages and for injunctive relief. The United States District Court for the Northern District of Georgia, Newell Edenfield, J., 429 F.Supp. 3, overruled defendant's motion to strike plaintiff's prayer for general and punitive damages, and issue was certified for interlocutory appeal. The Court of Appeals, Lynne, District Judge, held that general damages for pain and suffering and punitive damages were not recoverable in private action brought under Age Discrimination in Employment Act.

Reversed and remanded.

Appeal from the United States District Court for the Northern District of Georgia.

Before AINSWORTH and MORGAN, Circuit Judges, and LYNNE, Senior District Judge.*

LYNNE, District Judge:

Presented for review is a pretrial ruling of the district court in a suit which charges appellant, appellee's former employer, with employment discrimination in violation of the Age Discrimination in Employment Act (ADEA or the Act), 29 U.S.C. §621, et seq. Plaintiff is seeking reinstatement, back pay, liquidated damages, general damages (compensatory damages for psychosomatic injuries), and punitive damages.

Contending that neither general nor punitive damages are recoverable under the ADEA, appellant moved to strike plaintiff's prayer therefor. In an order of June 30, 1976, the trial court overruled such motion and certified the issue for interlocutory appeal pursuant to 28 U.S.C. §1292(b). We reverse.

The scope of recoverable damages under the ADEA is governed by Section 7[1] which incorporates part of the enforcement provisions of the Fair Labor Standards Act (FLSA).[2] Section 7(b) states:

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*Senior District Judge of the Northern District of Alabama, sitting by designation.

1. 29 U.S.C. §626.

2. 29 U.S.C. §201, et seq.

> Provisions of this Act shall be enforced in accordance with the powers, remedies and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended, and subsection (c) of this Act shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended. Amounts owing shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended. Provided, that liquidated damages shall be payable in cases of willful violations . . ..[3]

Reading together the ADEA and the identified sections of the FLSA, an employer is subject to liability to the employee for "unpaid minimum wages or unpaid overtime compensation" and that amount may be doubled to provide "liquidated damages", in cases of willful violations.

In addition, section 7(b) of the ADEA authorizes a court to grant such "legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments

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3. See 29 U.S.C. §§ 216(b), 260, 626(b).

> compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section."

[1] Appellee contends that the phrases in section 7(b) (authorizing "legal or equitable relieve . . . without limitation") and section 7(c) (authorizing legal or equitable relief . . ..") must be construed to sanction all traditional legal relief, including the award of punitive and general damages, and thus would "effectuate the purposes" of the ADEA. We disagree. The authorization of "legal or equitable relief" must be read, not in isolation, but in conjunction with the other provisions of the Act, the policies they further and the enforcement framework they envision.

[2] Under the Act, administrative remedies and suits brought by the Secretary of Labor are patently encouraged and preferred to private actions. The report of the Committee on Labor and Public Welfare reflects this preference:

> A condition precedent to the bringing of an action by an individual is that he must give the Secretary 60 days notice of his intention to do so. This is to allow time for the Secretary to mediate the grievance. It is intended that the responsibility for enforcement vested in the Secretary by Section 7 be initially directed through informal methods of conciliation and

that the formal methods be applied only if voluntary compliance cannot be achieved.[4]

Indeed, the filing of a complaint posited upon the ADEA by a private individual without first having given the Secretary 60 days notice of his intention to do so is proscribed. Moreover, if the Secretary commences an enforcement action within such sixty-day period the individual's right to maintain a private suit terminates. 29 U.S.C. § 626(c), (d).

GENERAL DAMAGES

[3] We are in accord with the result reached in Rogers v. Exxon Research & Engineering Co., 550 F.2d 834 (3rd Cir. 1977), in rejecting a claim for damages for pain and suffering in a private action brought under the ADEA. To restate the rationale of the opinion therein and to reexamine in depth its review of the legislative history of the Act in question would involve supererogation.

To be sure, the Congress was not unaware of, or insensitive to psychological and other damages incident to age-based employment discrimination.[5] It is more

4. 113 Cong.Rec. 31250 (Nov. 6, 1967).

5. See, e.g., 113 Cong.Rec. 31254 (Nov. 6, 1967) (Remarks of Sen. Javits); 113 Cong.Rec. 34745 (Dec. 4, 1967) (Remarks of Rep. Eilberg); 113 Cong.Rec. 34741 (Dec. 4, 1967) (Remarks of Rep. Steiger).

logical to infer from the remedial enforcement scheme contemplated by the Act legislative intent to prevent such injuries through compliance therewith, and in the event of non-compliance, prompt reinstatement, promotion or other equitable relief coupled with lost wages, and liquidated damages, if appropriate, rather than to read into the superficial phrase "Legal Relief"[6] wrenched from context, an intent to authorize the recovery of general damages after such injuries have been inflicted. The dominant purpose of the Act is easily discernable. It was enacted to prohibit discrimination in employment on

6. Appellant attaches undue significance to Congress' rejection of early drafts of Section 7 which authorized equitable relief but not legal relief, in favor of the current language which specifies both equitable and legal relief. The amendment to include legal relief may suggest the phrase was intended to have some meaning, but does not by itself justify awards of all forms of legal relief. See 113 Cong.Rec. 2199 (1967); 113 Cong.Rec. 2467 (1967); 113 Cong.Rec. 31248-49 (1967).

The provision for legal relief is not, as appellant contends, rendered meaningless by disallowance of general and punitive damages. Lost wages constitute legal relief under the FLSA and their adoption by Section 7(b) of the ADEA explains the use of the term "legal" in Section 7(c).

the basis of age.[7]

The silence of the Act with respect to general damages is entirely consistent with legislative intent to abstain from introducing a volatile ingredient into the tripartite negotiations involving Secretary, employee and employer which might well be calculated to frustrate rather than to "effectuate the purposes" of the Act.[8]

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7. Congress expressed its preference for the administrative process, avoidance of litigation and prevention of "overanxiety" on the part of American business. See 113 Cong.Rec. 31254 (Nov. 6, 1967) (Remarks of Sen. Javits); 113 Cong.Rec. 31253 (Nov. 6, 1967) (Remarks of Sen. Yarbrough); 113 Cong.Rec. 31250 (Nov. 6, 1967) (Committee Report); 113 Cong.Rec. 34745 (Dec. 4, 1967) (Remarks of Rep. Reid and Rep. Daniels); 113 Cong.Rec. 34747 (Dec. 4, 1967) (Remarks of Rep. Dent).

8. Several courts have refused to allow compensatory damages for pain and suffering because the ability to recover such a subjectively measured award would severely cripple the mediation process. Rogers v. Exxon Research & Engineering Co., supra; Cobb v. Chevron (N.D. Ga. April 25, 1977); Looney v. Commercial Union Assurance Co., 428 F.Supp. 533 (E.D.Mich. 1977); Sant v. Mack Trucks, 424 F.Supp. 621 (N.D. Cal. 1976); contra, Combes v. Griffin Television, Inc., 421 F.Supp. 841, 847 (N.D.Cal.1976); Bertrand v. Orkin Exterminating Co., 419 F.Supp. 1123, 1132-33 (N.D.Ill.1976), aff'd on rehearing, 432 F.Supp. 952 (N.D.Ill.1977).

PUNITIVE DAMAGES

[4] Appellee's claim for punitive damages fares no better. As is true of his claim for general damages it is squarely based upon the inclusion in section 7(b) of the Act of the general reference to "legal . . . relief as may be appropriate to effectuate the purposes of this Act . . . .", 29 U.S.C. § 626(b).

Four aspects of section 7(b) deserve evaluation in determining the propriety of awarding punitive damages thereunder:

(1) the availability of employment, reinstatement, or promotion relief;

(2) the availability of amounts deemed to be back pay;[9]

(3) the availability of liquidated damages for willful violations; and

(4) no reference to punitive damages.

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9 Section 7(b) of the Act specifically provides that "[a]mounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation." Such amounts are lost wages or back pay. See Pons v. Lorillard, 69 F.R.D. 576 (M.D.N.C. 1976).

In concluding that potential recovery of general damages in a private action is incompatible with the remedial framework of the Act we have adverted to (1) and (2). While the Exxon court was not required to address the issue of punitive damages its penetrating analysis led to the observation that

> "Congress saw fit to restrict the penalty provisions of the Act to doubling the amount of lost earnings. To allow psychic distress awards in addition would in a very real sense thwart the limitation Congress thought advisable to impose."[10]

The provisions for liquidated damages for willful violation of the Act and its silence as to punitive damages convinces us that the omission of any reference thereto was intentional. In 1968, only one year after the passage of the ADEA, Congress passed the fair housing provisions of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§3601-3619. Section 3612(c) thereof expressly authorizes the recovery of punitive damages, proving as follows:

> "The Court, . . . may award to the plaintiff actual damages and not more than $1,000 punitive damages . . . ." [Emphasis supplied].

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[10] 550 F.2d at 840.

Thus it is obvious that, if Congress believed punitive damages necessary to eliminate discrimination in employment based on age, it knew exactly how to provide for them.

Our opinion that Congress preferred liquidated damages in lieu of punitive damages is supported by the following remarks of Senator Jacob Javits appearing before the Subcommittee on Labor of the Senate Labor and Public Welfare Committee:

> ". . . the criminal penalty in cases of willful violations has been eliminated and a double liability substituted. This will furnish an effective deterrent to willful violations."[11]

It is quite apparent that Senator Javits, sponsor of the original bill and the amendments thereto which appear in the final enactment, held the view that liquidated damages could effectively supply the deterrent and punitive

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[11] Hearings on S. 788 and S. 830 before the Subcom. on Labor of the Senate Labor and Public Welfare Comm., 90th Cong., 1st Sess., 113 Cong. Rec. 7076 (1967).

damages which both criminal penalties and punitive damages normally serve.[12]

In summary, we hold that neither general damages nor punitive damages are recoverable in private actions posited upon the ADEA. We therefore reserve and remand for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

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[12] 113 Cong. Rec. 2199 (Feb. 1, 1967); 113 Cong. Rec. 31254 (Nov. 6, 1967).

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 76-3272

D. C. Docket No. C76-237A

HENRY CARL DEAN,

Plaintiff-Appellee,

versus

AMERICAN SECURITY INSURANCE COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

Before AINSWORTH and MORGAN, Circuit Judges, and LYNNE, District Judge.*

---

* Senior District Judge of the Northern District of Alabama, sitting by designation.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remaned to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered that plaintiff-appellee pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

September 23, 1977

Issued as Mandate:

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

October 26, 1977

TO ALL PARTIES LISTED BELOW:

NO. 76-3272 - HENRY CARL DEAN
V. AMERICAN SECURITY
INSURANCE COMPANY

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing,** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By Brenda M. Hauck
Deputy Clerk

** on behalf of appellee, Henry Carl Dean,

cc: Messrs. David R. Aufdenspring
R. Carl Cannon
Messrs. Bruce D. Duncan
Charles E. Moore

STATUTE INVOLVED

29 U.S.C. §626

(b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), and 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemd to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter.

Supreme Court, U. S.
FILED
JAN 5 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-812

HENRY CARL DEAN,

Petitioner,

vs.

AMERICAN SECURITY INSURANCE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DAVID R. AUFDENSPRING
R. CARL CANNON

Counsel for Respondent

POWELL, GOLDSTEIN, FRAZER & MURPHY
1100 C & S National Bank Building
Atlanta, Georgia 30303

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-812

HENRY CARL DEAN,

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v.

AMERICAN SECURITY INSURANCE COMPANY,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

Respondent is satisfied with Petitioner's "Statement" of the case.

ARGUMENT

The Petitioner has petitioned the Court for a writ of certiorari to review the Fifth Circuit's decision that neither general damages for pain and suffering nor punitive damages may be recovered under the provisions of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 et seq. (hereinafter the "ADEA"). The Respondent respectfully submits that there are no "special or important" reasons justifying the Court's review as required by Rule 19 of the Supreme Court Rules in that the Fifth Circuit's decision is not in conflict with the decision of any other court of appeals and the ADEA clearly does not authorize awarding either general damages for pain and suffering or punitive damages.

The Fifth Circuit's decision that the ADEA does not authorize recovery of general damages for pain and suffering is clearly in accord with the decision of the only other court of appeals which has considered the issue. See Rogers v. Exxon Research & Engineering Co., 550 F.2d 834 (3d Cir. 1977), petition for cert. filed, 46 U.S.L.W. 3108 (U.S. April 20, 1977) (No. 76-1451). Moreover, the decision is also in accord with the decisions of the majority of district courts outside the Fifth and Third Circuits. See Travers v. Corning Glass Works, Inc., 15 F.E.P. Cases 584 (S.D.N.Y., Sept. 1, 1977); Fellows v. Medford Corp., 431 F. Supp. 199 (D. Ore. 1977); Looney v. Commercial Union Assurance

Companies, 428 F. Supp. 533 (E.D. Mich. 1977); Hannon v. Continental National Bank, 427 F. Supp. 215 (D. Colo. 1977); Sant v. Mack Trucks, Inc., 424 F. Supp. 621 (N.D. Cal. 1976). Contra, Walker v. Pettit Construction Co., 16 F.E.P. Cases 118 (D.S.C., Sept. 30, 1977); Coates v. National Cash Register Co., 433 F. Supp. 655 (W.D. Va. 1977); Bertrand v. Orkin Exterminating Co., 432 F. Supp. 952 (N.D. Ill. 1977); Combes v. Griffin Television, Inc., 421 F. Supp. 841 (W.D. Okla. 1976).

In addition, although the Fifth Circuit is the only court of appeals which has considered whether the ADEA authorizes recovery of punitive damages, its decision is consistent with the Third Circuit's

reasoning in Rogers v. Exxon Research & Engineering Co., supra. Furthermore, of the district courts outside the Fifth Circuit, only one has held that punitive damages may be recovered under the ADEA. See Walker v. Pettit Construction Co., supra. All the rest have agreed that the ADEA does not authorize recovery of such damages. See Fellows v. Medford Corp., supra; Looney v. Commercial Union Assurance Companies, supra; Hannon v. Continental National Bank, supra; Platt v. Burroughs Corp., 424 F. Supp. 1329 (E.D. Pa. 1976).

Finally, the paucity of lower court decisions regarding these issues renders review by the Court particularly inappropriate at this time.

CONCLUSION

For the foregoing reasons, the Respondent respectfully submits that the Court should deny the Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

DAVID R. AUFDENSPRING

R. CARL CANNON

Counsel for Respondent

POWELL, GOLDSTEIN, FRAZER & MURPHY
1100 C & S National Bank Building
Atlanta, Georgia 30303

CERTIFICATE OF SERVICE

I hereby certify that I have this day served two copies of the foregoing Brief in Opposition to Petition For a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit on counsel for the Petitioner in this matter by mailing the same in a properly addressed envelope in the United States Mail, with sufficient postage thereon, to:

Mr. Bruce D. Duncan
Mr. Charles E. Moore
325 Hammond Drive
Suite 205
Atlanta, Georgia 30328

This 4th day of January, 1978.

R. Carl Cannon
R. CARL CANNON
Counsel for Respondent